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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No.----------

HENRY HAWK, PETITIONER,

V.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON, Attorney General of Nebraska,
H. EMERSON KOKJER,
JOHN H. COMSTOCK,
Assistant Attorneys General of Nebraska,
Counsel for Respondent.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

The petitioner in this case, Henry Hawk, is asking that a writ of certiorari issue out of this court to review a judgment of United States Circuit Court of Appeals,

Eighth Circuit, dated October 19, 1942, *Hawk* v. *Olson*, 130 Fed. (2d) 910, affirming an order of the Honorable John W. Delehant, Judge of the District Court of the United States for the District of Nebraska, Lincoln Division, denying the petition for writ of habeas corpus filed by appellant, hereinafter referred to as petitioner, and discharging the order to show cause made prior thereto, filed April 10, 1942.

The case involves no question of national or sectional importance, nor any remote federal question, nor any inter-court conflict as to the law. It involves merely a question of Nebraska law, decided adversely to petitioner by the Supreme Court of Nebraska.

Petitioner is merely seeking a hearing in this court which is obviously for the purpose of a rehearing only.

NATURE AND STATEMENT OF THE CASE.

Petitioner contends:

1. That at all times during the progress of the trial, which culminated in his conviction of the offense with which he was charged, he was a Federal prisoner and beyond the jurisdiction of the courts of Nebraska.

2. That he was "hurried to conviction," in that there was too much haste in his trial before both the examining magistrate and the district court.

3. That he was denied the right of counsel and compulsory process.

4. That the state produced perjured and manufactured testimony.

5. That he was deprived, by the trial court, prosecuting officials, and the Supreme Court of Nebraska, of his right to appeal from his conviction.

6. That he was kidnapped out of California by the Nebraska officers.

7. That his sentence was "without the jurisdiction of the trial court to pronounce," that the "respondent is without jurisdiction or authority to detain him, and that he is deprived of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States."

Petitioner is being held by a judgment of the District Court of Douglas County, Nebraska, sentencing petitioner to confinement in the Nebraska State Penitentiary for the term of his natural life. The order is as follows:

"The State of Nebraska,	)	39-464
Plaintiff,	)	
vs.	)	INFORMATION
Henry Hawk, alias Henry	)	First Degree Murder
Hawks, alias Charles Henry,	)	While Attempting to
Defendant.	)	Rob.

"Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into court in custody of guards of the Federal Penitentiary, Leavenworth, Kansas.

"Thereupon this cause comes on for hearing upon the motion of said defendant for a new trial; upon consideration whereof, being fully advised in the premises, it is ordered by the Court that said motion be, and hereby is, overruled.

"Whereupon said defendant is arraigned for sentence and is informed by the Court of the verdict of the jury heretofore returned herein finding him, the said defendant, guilty of murder in the first degree, in manner and form as charged in the information, and fixing the penalty at imprisonment in the penitentiary during life.

"Whereupon said defendant is inquired of if he has anything to say why judgment should not be pronounced against him. Showing no good and sufficient cause why such judgment should not be pronounced;

"It is, therefore, considered, ordered and adjudged by the Court that the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein be by the Warden of said Federal Penitentiary delivered into the custody of the Sheriff of Douglas County, Nebraska, and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life, no part of which said period of time is by virtue of this sentence to be spent in solitary confinement, and that he pay the costs of this prosecution, taxed at $——.

"THE STATE OF NEBRASKA }
COUNTY OF DOUGLAS } ss.

"I, Frank McGrath, Clerk of the District Court, in and for Douglas County in the Fourth Judicial District of Nebraska, do hereby certify that the above and foregoing is a true copy of judgment and sentence entered in a cause in said Court wherein

The State of Nebraska is Plaintiff and Henry Hawk, alias Henry Hawks, alias Charles Henry is Defendant, Docket 39, Number 464 as the same appears fully upon the records of said Court now in my charge remaining as Clerk aforesaid.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Omaha, this 26th day of March A. D., 1936.

"Frank McGrath, Clerk.

(signed)--By Maxwell McCollough, Deputy

"Petitioner's Exhibit 'A' excerpt set out in paragraph one of the petition for Habeas Corpus.

"Henry Hawk, Box 13-274, Lancaster via Lincoln, Nebraska."

The order of the District Court of the United States for the District of Nebraska, Lincoln Division, dated April 9, 1942, denying the issuance of a writ of habeas corpus, is as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA LINCOLN DIVISION

"HENRY HAWK, Petitioner	)	No. 147 CIVIL
v.	)	ORDER
NEIL OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent	)	

"On this 9th day of April, 1942, this cause comes on regularly for hearing, and ruling, upon the peti-

tion of the petitioner filed herein, the showing of cause against the issuance of a writ of habeas corpus filed herein by the respondent, and the petitioner's answer or countershowing in opposition thereto,

"Upon consideration of which, the court, being fully advised in the premises finds that the petitioner's petition for writ of habeas corpus, together with the several exhibits referred to and identified therein and filed therewith, is, as a matter of law, insufficient to sustain or support the issuance of a writ of habeas corpus in this proceeding; that the order to show cause heretofore entered herein should be discharged; that the issuance of a writ of habeas corpus herein should be denied, and that the petitioner's action should be dismissed.

"IT IS THEREFORE CONSIDERED AND ORDERED

"1. That the order to show cause heretofore made and entered herein be and it hereby is discharged;

"2. That the issuance of a writ of habeas corpus herein be and it hereby is denied;

"3. That the petition for writ of habeas corpus filed herein by the petitioner and the petitioner's alleged cause of action in this case be and the same hereby are dismissed;

"4. That the Clerk of this Court transmit to the petitioner individually and to the Attorney General of the state of Nebraska, as counsel for the respond-

ent, a copy of this order and a copy of the memorandum filed in this case concurrently herewith.

"BY THE COURT:

John W. Delehant
United States District Judge"

Petitioner is a man of more than ordinary intelligence and is by no means a stranger to court proceedings and pleading and practice. The following is a brief outline of various other prior occasions wherein petitioner has raised the present issues.

1. Case 1038 in this court. December 15, 1936, instituted action for writ against the chief justice and associate justices of the Supreme Court of Nebraska. Writ denied by Judge Munger, and petition for rehearing later dismissed for want of prosecution.

2. Case 1105 in this court. May 11, 1938, Petition for writ filed by leave of court. June 2, 1938, order entered requiring respondent to show cause why writ should not issue. June 17, 1938, Petition dismissed and writ denied by Judge Munger.

3. Case 1121 in this court. September 15, 1938, Petition for writ filed by leave of court and forthwith denied on the ground of its insufficiency to sustain the issuance of a writ.

4. March 7, 1939, Commenced action in District Court of Lancaster County, Nebraska. March 25, 1939, Writ denied. Action appealed to Supreme Court of Nebraska and after submission of typewritten briefs by special leave of that court, the action of the district court was affirmed. Hawk v. O'Grady, 137 Neb. 639. October 19, 1940, Certiorari

denied by the Supreme Court of the United States. Hawk v. O'Grady, 311 U. S. 645.

5. July 24, 1941, Petitioned District Court of Lancaster County, Nebraska, for writ. October 28, 1941, Writ denied.

6. And now this latest effort.

Sec. 15, Art. I, Constitution of Nebraska, upon which petitioner relies, is as follows:

> "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state *for any offense committed within the state.*" (Italics supplied.)

Petitioner relies on the following sections of Nebraska statutes:

> "29-2810. (Comp. St. Neb., 1929) Prisoners and Persons in Custody of Officer, Not Delivered to Another Officer, Exception. If any person in this state shall be committed to prison, or be in custody of any officer for any criminal matter, such prisoner shall not be removed therefrom into the custody of any other officer unless by legal process, or when the prisoner shall be delivered to some inferior officer to carry to jail, or shall, by order of the proper court, be removed from one place to another within the state, for trial, or in case of fire, infection or other necessity; and if any person, after such commitment, shall make out or sign or countersign any warrant for such removal, contrary to this chapter, he or she shall for every such offense forfeit to the party aggrieved five hundred dollars.

"29-2811. (Comp. St. Neb., 1929) Accessories Before the Fact in Capital Cases, Not Bailable. When any person shall appear to be committed by any judge or magistrate, and charged as accessory before the fact to any felony, the punishment whereof is capital, which felony shall be plainly and especially charged in the warrant of commitment, such person shall not be removed or bailed by virtue of this chapter, or in any other manner than as if this chapter had not been enacted.

"29-2812. (Comp. St. Neb., 1929) Extradition of Citizens of Nebraska for Prosecution in Sister State, When Allowed. No citizen of this state, being an inhabitant or resident of the same, shall be sent a prisoner to any place whatever out of the state, for any crime or offense committed within this state, except in cases specially authorized by law, and every such imprisonment is hereby declared to be illegal. If any such citizen shall be so imprisoned, he may for every such imprisonment maintain an action of false imprisonment, in any court having cognizance thereof, against the person or persons by whom he shall be so imprisoned or transported contrary to law, and against any person who shall contrive, write, seal, sign or countersign any writing for such imprisonment or transportation, or shall be aiding and assisting in the same or any of them, and shall recover triple costs besides damages, which damages, so to be given, shall not be less than five hundred dollars; and every person knowingly concerned in any manner as aforesaid, in such illegal imprisonment or transportation, contrary to this chapter, and being thereof lawfully convicted, shall be disabled from henceforth to bear any office of trust or profit within this state: Provided, if any citizen of this state, or any person or persons at any

time resident in the same, shall have committed, or shall be charged with having committed, any treason, felony or misdemeanor in any other part of the United States or territories where he or she ought to be tried for such offense, he, she or they may be sent to the state or territory having jurisdiction of the offense.

"29-1803. (Comp. St. Neb., 1929) Court Assign Counsel for Accused, When, Counsel Fees Audited and Allowed by Court, Public Defender. The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours; and it shall not be lawful for the county clerk or county board of any county in this state to audit or allow an account, bill or claim hereafter presented by an attorney or counselor at law for services performed under the provisions of this section, until said account, bill or claim shall have been examined and allowed by the court before whom said trial is had, and the amount so allowed for such services certified by said court; Provided, no such account, bill or claim shall in any case, except in cases of homicide, exceed one hundred dollars. Provided, further, that there is hereby created, in counties that now have, or that shall hereafter attain a population of 100,000 inhabitants, or more, the office of public defender who shall be elected at the general election in the year 1916, and every four years thereafter, and whose duty it shall be to defend all persons who shall be indicted or informed against in the district court for any offense which is capital,

or punishable by imprisonment in the penitentiary, if the prisoner has not the ability to procure counsel. He shall also, upon request, prosecute actions for the collection of wages and of other demands of persons who are not financially able to employ counsel in cases in which the sum involved does not exceed $100, and in which, in the judgment of the public defender, the claims urged are valid and enforceable in the courts. He shall also, upon request, defend such persons in all civil litigations in which, in his judgment, they are being prosecuted or unjustly harassed. The salary of such public defender, shall be the sum of three thousand six hundred dollars per annum, payable monthly, to be paid by the county commissioners of the county out of the general fund of such county. Such public defender shall be a lawyer in good standing at the bar of the court in such county. Such elected public defender shall take office after his election and qualification at the same time that other county officers take office.

"29-1805. (Comp. St. Neb., 1929) Exceptions to Indictment, Time Allowed Accused to Prepare. The court shall allow the accused a reasonable time to examine the indictment and prepare exceptions thereto.

"29-2215. (Comp. St. Neb., 1929) Same Bench Paroles, Conditions. When any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation, which period shall not exceed, in the case of any defendant convicted of an offense less than a felony, two years; and in the case of any defendant convicted of a felony, five years. The conditions of probation shall be such as the court shall in its discretion prescribe, and it may include among other

conditions any or several of the following: That the probationer (a) shall indulge in no unlawful, disorderly, injurious or vicious habits; (b) shall avoid places or persons of disreputable or harmful character; (c) shall report to the probation officer as directed by the court or probation officer; (d) shall permit the probation officer to visit him in a reasonable manner at his place of abode or elsewhere; (e) shall answer any reasonable inquiries on the part of the probation officer concerning his conduct or condition; (f) shall work faithfully at suitable employment; (g) shall remain or reside within a specified place or locality; (h) shall abstain from the use of alcoholic beverages if the use of the same contributed to his offense; (i) shall pay in one or several sums a fine imposed at the time of being placed on probation; (j) shall make reparation or restitution to the aggrieved parties for actual damage or losses caused by his offense; and (k) shall support his wife or children. The court or a magistrate thereof may modify the conditions and the period of probation; may, in case of violations of the probationary conditions issue a warrant for the arrest of the probationer; and may at any time discharge the probationer; and in the case of violation of the probationary conditions, the court may impose any penalty which it might have imposed before placing the defendant on probation: Provided, if committed, he be committed to an institution authorized by law to receive commitments. If a probationer without permission disappears from oversight, or departs from the jurisdiction of the court, the time during which he keeps his whereabouts hidden or remains away from the jurisdiction of the court may be added to the original period of probation.

"29-2401. (Comp. St. Neb., 1929) Execution of Sentences, Conviction of Felony, When and By Whom Prisoner Conveyed to Penitentiary. Every person sentenced to the penitentiary shall, within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of said penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired, or he shall be pardoned. If the execution of the sentence be suspended and the judgment is afterward affirmed, the defendant shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed.

"29-2402. (Comp. St. Neb., 1929) Same, Powers and Duties of Sheriffs. The sheriffs of the several counties of this state, during the time they shall be employed in conveying to the penitentiary any person sentenced to imprisonment therein, shall have the same power and authority to secure him in any jail within the state, and to demand the assistance of any sheriff, jailer or other person within this state, in keeping such prisoner, as if the sheriff were in his own proper county; and all such sheriffs, jailers or other persons so called upon shall be liable, on refusal, to the same penalties as if the sheriff making the demand were in his own county."

The Supreme Court of Nebraska in the case of *Hawk* v. *O'Grady*, 290 N. W. 911, wherein present petitioner was also a petitoner for writ of habeas corpus, the court in the syllabus said:

1. " 'On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.' In re Fanton, 55 Neb. 703, 76 N. W. 447, 70 Am. St. Rep. 418.

2. "To obtain a release by habeas corpus, the judgment or sentence must be an absolute nullity.

3. "The sentence in the instant case, imposing punishment by confinement in the state penitentiary, is regular and in strict accord with the statutes."

In its opinion (page 911), the court said:

"At the time of his trial and sentence in the District Court for Douglas County, Hawk was under sentence imposed by the Federal Court. The order made by the state court was no more than a mere recognition of that fact, consistent with comity which prevails between these jurisdictions. The valid sentence imposed by the District Court for Douglas County we have indicated by italics above ('and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life'). It is under these provisions, so italicized, that the petitioner is retained in custody. Even if the provisions of the order and sentence relative to delivery of custody of the prisoner to the federal officers and the return of the custody of the prisoner to the sheriff of Douglas County on completion of his federal sentence were to be deemed in excess of the powers of the District Court for Douglas County, still under existing circumstances Hawk would be entitled to no relief."

And, on page 912, the court further says:

> "So far as the sentence in this case imposing punishment in the state penitentiary is concerned, it is regular and in strict accord with the statutes."

It is perfectly plain, from the language of the court quoted above, that the Supreme Court of Nebraska interpreted that part of the judgment of the District Court of Douglas County which ordered the defendant, Henry Hawk, to be returned to the Federal Penitentiary at Leavenworth, as no part of the sentence imposed upon the defendant for a crime committed in Nebraska, but as merely an order by the court for the delivery of custody to the Federal Penitentiary. Such an order could not conceivably be regarded as violative of Sec. 15, Art. I, of the Nebraska Constitution. Whether or not it was violative of the sections of the Nebraska statutes upon which petitioner now relies, the court did not say. It did say that whether such order was or was not violative of those statutes, the question was not one which could properly be raised in a petition for habeas corpus.

SUMMARY OF POINTS AND ARGUMENT.

POINT A—On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered.

POINT B—No court may by writ of habeas corpus properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person or some matter rendering the proceeding void.

POINT C—A criminal prosecution in the court of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the

settled course of judicial proceedings as established by the law of the state, is due process of law in the sense of U. S. Constitution, 14th Amendment, so long as it includes notice and a hearing or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure.

POINT D—This court will not review and revise the construction affixed to a state statute as to a question of local law by the court of last resort of the state.

POINT E—The writ of habeas corpus will not issue unless the averments of the petition, taken as true, show probable cause, and a prima facie case for relief.

POINT F—Petition herein for a writ of certiorari should be denied as it fails to show any error in the proceedings under which petitioner was convicted.

POINT G—Petition herein for a writ of certiorari should be denied as it fails to show that if any error was committed in the proceedings, such error was jurisdictional or such as to render the judgment of conviction void.

POINT H—Petition herein for a writ of certiorari should be denied as it fails to show that any rights of petitioner under the Constitution or laws of the United States have been impaired.

POINT I—The Supreme Court of Nebraska is authorized by the State Constitution and laws to make and enforce regulatory rules of practice before that court.

POINT J—Petition herein for a writ of certiorari should be denied, as none of the authorities cited by petitioner in his supporting brief sustains his claim for a writ.

ARGUMENT.

Point A.

On An Application for a Writ of Habeas Corpus, Errors or Irregularities in the Criminal Trial, Not Jurisdictional, Will Not be Considered.

This is one of the points decided, and set out in the syllabus by the court, in the case of *Hawk* v. *O'Grady*, 137 Neb. 639, 290 N. W. 911.

The same point has been repeatedly decided by both the Supreme Court of Nebraska and by this court. *In re John Fanton*, 55 Neb. 703, 76 N. W. 447; *Hulbert* v. *Fenton*, 115 Neb. 818, 215 N. W. 104; *Michaelson* v. *Beemer*, 72 Neb. 761, 101 N. W. 1007; *McElhaney* v. *Fenton*, 115 Neb. 299, 212 N. W. 612; *Frank* v. *Mangum*, 237 U. S. 309; *Keizo* v. *Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; *In re Lewis*, 114 Fed. 963; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *McElvaine* v. *Brush*, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Wight* v. *Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

Point B.

No Court May by Writ of Habeas Corpus Properly Release a Prisoner Under Conviction and Sentence of Another Court, Unless for Want of Jurisdiction of Cause or Person or Some Matter Rendering the Proceeding Void.

This proposition is merely an amplification of Point A. It is sustained by the authorities quoted under that point, supra.

Point C.

A Criminal Prosecution in the Courts of a State, Based Upon a Law not in Itself Repugnant to the Federal Constitution, and Conducted According to the Settled Course of Judicial Proceedings as Established by the Law of the State, is due Process of Law in the sense of U. S. Constitution, 14th Amendment, so long as it includes Notice and a Hearing or an Opportunity to be Heard Before a Court of Competeent Jurisdiction, According to Established Modes of Procedure.

Some of the numerous authorities supporting this proposition are: *Frank* v. *Mangum,* 273 U. S. 309; *Ex parte Royall,* 117 U. S. 241, 251, 29 L. Ed. 868, 871, 6 Sup. Ct. Rep. 734; *In re Frederich,* 149 U. S. 70, 77, 37 L. Ed. 653, 657, 13 Sup. Ct. Rep. 793; *Whitten* v. *Tomlinson,* 160 U. S. 231, 242, 40 L. Ed. 406, 412, 16 Sup. Ct. Rep. 297; *Baker* v. *Grice,* 169 U. S. 284, 291, 42 L. Ed. 748, 18 Sup. Ct. Rep 323; *Tinsley* v. *Anderson,* 171 U. S. 101, 105, 43 L. Ed. 91, 96, 18 Sup. Ct. Rep. 805; *Markuson* v. *Boucher,* 175 U. S. 184, 44 L. Ed. 124, 20 Sup. Ct. Rep. 76; *Urquhart* v. *Brown,* 205 U. S. 179, 51 L. Ed. 760, 27 Sup. Ct. Rep. 459.

Point C as set forth above is the verbatim language of paragraph two (2) of the syllabus in the case of *Frank* v. *Mangum.* Excerpts from the opinion of Mr. Justice Pitney are as follows:

> "It is indeed settled by repeated decisions of this court that where it is made to appear to a court of the United States that an applicant for habeas corpus is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the state not in itself repugnant to the Federal

Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error.

"(Quoting with approval what was said in Covell v. Heyman, 111 U. S. 176, 182, 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, a case of conflict of jurisdiction): 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore, of necessity.'

"It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties."

Point D.

This Court will not Review and Revise the Construction Affixed to a State Statute as to a Question of Local Law by the Court of Last Resort of the State.

The language of the Supreme Court of the United States in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, is as follows:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205, 82 L. Ed. 1290, that court said:

> "The decision in Erie R. Co. v. Tompkins, * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In the instant case, the Supreme Court of Nebraska has decided that the order of the District Court of Douglas County returning the petitioner to the custody of the Federal Penitentiary was not a violation of Sec. 15, Art. I, of the Nebraska Constitution, has decided that if said order was violative of Sections 29-2810, 29-2811, 29-2812, Compiled Statutes of Nebraska, 1929, the judgment of conviction including the order was not for that reason void, did not for that reason deprive the court of jurisdiction. There being no federal question involved, it was the sole province of the Supreme Court of Nebraska to determine the meaning and purport of the State Constitution and statutes.

Point E.

The Writ of Habeas Corpus will not issue unless the Averments of the Petition, Taken as True, Show Probable Cause, and a Prima Facie Case for Relief.

The language of *Frank* v. *Mangum*, supra, on this point is as follows:

"It was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it," citing Ex parte Watkins, 3 Pet. 193, 201, 7 L. Ed. 650, 652; Ex parte Milligan, 4 Wall. 2, 110, 18 L. Ed. 281, 292, Ex parte Terry, 128 U. S. 289, 301, 32 L. Ed. 405, 407, 9 Sup. Ct. Rep. 77.

Point F.

Petition Herein for a Writ of Habeas Corpus Should be Denied as it Fails to Show any Error in the Proceedings Under Which Petitioner was Convicted.

The gist of petitioner's original action in habeas corpus is that the judgment and sentence of the District Court in Douglas County was void because it was in contravention of Sec. 15, Art. I, of the Constitution of the State of Nebraska, and Sections 29-2810, 29-2811, 29-2812, 29-1803, 29-1805, 29-2215, 29-2401, and 29-2402, Compiled Statutes of Nebraska for 1929. However, petitioner utterly fails to show wherein this judgment and sentence of the District Court was void or even voidable.

Sec. 15, Art. I, Constitution of Nebraska, merely provides "nor shall any person be transported out of the state for any offense committed within the state." He fails to show that he was "transported out of the state for any offense committed within the state." The judgment and sentence of the District Court of Douglas County plainly states that he was a federal prisoner and that he was returned to the Federal Penitentiary to serve sentence for a federal offense. The burden is on petitioner to show wherein the order of the court violated the State Constitution.

Section 29-2810 provides "* * * such prisoner shall not be removed therefrom into the custody of any other officer, unless by legal process * * *." The burden is on the petitioner to show that the order of the District Court of Douglas County was not "legal process." The statute nowhere states that a violation thereof would be an error in the proceedings, much less an error depriving the court of jurisdiction. The statute provides a penalty for the violation thereof, indicating a legislative intent that no higher or greater effect should be given to a violation thereof.

Section 29-2811 is obviously intended to prevent the release on bail of accessories before the fact in capital cases. The burden is on petitioner to show wherein the order of the court violated the statute.

Section 29-2812 provides that "no citizen of this state, being inhabitant or resident of the same shall be sent a prisoner to any place whatever out of the state for any crime or offense committed within this state * * *."

The statute therefore uses the identical language of Sec. 15, Art. I, Constitution of Nebraska, quoted above. This statute, like 29-2810, provides penalties for the violation thereof. The burden is on petitioner to show wherein the order of the District Court of Douglas County violated this section.

Section 29-1803 provides for the appointment of counsel to persons indicted for an offense which is capital or punishable by imprisonment in the penitentiary under certain circumstances and in no way sustains the position of the petitioner in the within matter for the

reason that his own petition, pleadings, and the record herein, discloses absolutely that he was represented at and throughout his trial by Mr. Joseph M. Lovely, the public defender of Douglas County, Nebraska, together with one John N. Baldwin, one of his assistants. The record further shows that he was well defended by these attorneys throughout his trial.

Section 29-1805 provides that the court shall allow accused a reasonable time to examine the indictment and prepare exceptions thereto. The record discloses that the petitioner was not hurried to trial.

More than one month intervened between the arraignment and the actual trial. Nearly two years intervened between the commission of the offense and the trial. A careful examination of the record will disclose facts which refute any inference that the petitioner was subjected to "a swift reckless pretense of a trial." Any alleged error in this respect, providing the same did exist, was a matter at most not more than error in the proceeding of the trial court, which, under the law, petitioner was required to present by direct appeal to the Supreme Court of Nebraska and would not be the basis for the issuance of a writ of habeas corpus.

Section 29-2215 deals with the granting of bench paroles under certain circumstances and has no bearing whatever upon the present matter.

Section 29-2401 deals with the execution of sentences upon conviction and provides that every person sentenced to the penitentiary shall be conveyed to the penitentiary by the sheriff of the county in which the conviction took place, and further provides that if the execution of the sentence be suspended that

the defendant shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed. There is nothing in the record to show any violation of this section of the statute. Under the judgment of the court the sentence of the defendant upon his conviction of the offense in Nebraska was suspended in order to allow the defendant to finish serving the term in the Federal Penitentiary, and in compliance with this section of the statute defendant was conveyed to the penitentiary within thirty days after the court directed the sentence to be executed.

Section 29-2402 deals with the powers of the sheriffs of the several counties in conveying to the penitentiary persons sentenced to imprisonment therein, but there is nothing in the record to show that this section of the statute was in any way violated.

The burden is upon the petitioner to show that the order of the District Court of Douglas County, Nebraska, violated these sections of the statute and that the violation thereof was such as to make the judgment and sentence absolutely void, which is not shown to be the case.

Point G.

Petition Herein for a Writ of Habeas Corpus Should be Denied as it Fails to Show that if any Error was Committed in the Proceedings, Such Error was Jurisdictional or such as to Render the Judgment of Conviction Void.

The discussion under Point F, supra, is applicable here, *a fortiori.*

Point H.

Petition Herein for a Writ of Habeas Corpus Should be Denied as it Fails to Show that any Rights of Petitioner Under the Constitution or Laws of the United States Have Been Impaired.

In the case of *Frank* v. *Mangum* the court said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the 14th Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with," citing Hurtado v. California, 110 U. S. 516, 532, 538, 28 L. Ed. 232, 237, 239, 4 Sup. Ct. Rep. 111, 292; Lem Woon v. Oregon, 229 U. S. 586, 589, 57 L. Ed. 1340, 1341, 33 Sup. Ct. Rep. 783, and cases cited.

The burden is on the petitioner to show wherein the form or mode of procedure adopted by the District Court of Douglas County deprived him of an essential right or rights of notice or hearing or opportunity to be heard before a competent tribunal. The application for a writ of habeas corpus wholly fails to show any such deprivation.

Petitioner makes the assertion that he was "kidnapped out of the State of California by lawless men," in violation of Title 18, Section 408 (a), U. S. C. A., cited by petitioner. In this regard, petitioner sets forth the following facts: By the terms of his judgment and sentence it was adjudged that petitioner be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he was then serving there-

in that he be by the warden of the Federal Penitentiary delivered into the custody of the Sheriff of Douglas County, Nebraska, and be then taken by said sheriff to the Nebraska State Penitentiary and that he be there imprisoned at hard labor during the term of his natural life. The validity of this sentence is conclusively affirmed by the Supreme Court of Nebraska in the case of *Hawk* v. *O'Grady*, 137 Neb. 639, 290 N. W. 911. That thereafter, and on about the 4th day of August, 1936, the petitioner for some reason was transferred from Leavenworth to Alcatraz Penitentiary. Later, and on about the 27th day of November, 1937, petitioner alleges he was paroled from Alcatraz Penitentiary, whereupon these "lawless men," who the facts show were the Sheriff and County Attorney of Douglas County, Nebraska, appeared at Alcatraz, took the custody of the petitioner, and returned him to the Penitentiary at Lancaster, near Lincoln, Nebraska. This is not kidnapping. It was merely the simple performance by the Douglas County officials of their manifest duty under the judgment and sentence of the District Court of Douglas County, Nebraska, in petitioner's own case. The section referred to by petitioner merely denounces the crime of transporting in interstate and foreign commerce the victim of a kidnapping and in no way has anything to do with a situation such as the one set out by the petitioner.

Point I.

The Supreme Court of Nebraska is Authorized by the State Constitution and Laws to Make and Enforce Regulatoory Rules of Practice Before that Court.

Article V, Section 25, of the Constitution of Nebraska, provides as follows:

"For the effectual administration of justice and the prompt disposition of judicial proceedings, the Supreme Court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusion as to desirable amendments or changes in the general laws governing such practice and proceedings."

In addition to this the legislature enacted Section 27-210, Compiled Statutes of Nebraska for 1929, which is as follows:

"The judges of the Supreme Court shall during the month of January in the year 1913 and each second year thereafter revise the general rules of said court and adopt such additional rules as may be deemed necessary or appropriate for the dispatch of business before said court including rules for the advancement of pending causes."

Under this authority the Supreme Court adopted the Revised Rules of the Supreme Court of the State of Nebraska, which were in force in 1936, in which Rule 3 is as follows:

"DEFAULTS.—Whenever the brief of the party having the affirmative is not on file by brief day, the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof

within the time provided by Rule 12, he may proceed ex parte. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order."

The rules with reference to printed briefs are Rule 14a, which is as follows:

"All briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size; the printed matter to be 24 picas wide and 42 picas long. The type used in the printing may be 12 point but not smaller than 11 point, except that exhibits may be printed in smaller sizes when necessary. Italic type may be used in citations."

And 14d, which is as follows:

"The clerk of this court shall refuse to receive or file any brief not prepared in accordance with this rule and he shall immediately notify counsel of the objections thereto."

And 12-3, which is as follows:

"In criminal cases the plaintiff in error shall file his briefs together with proof of service upon the Attorney General within one month from the date the appeal is docketed. The State shall serve and file its brief within one month thereafter."

Petitioner claims he was deprived by the trial court and prosecuting officials and thereafter by the Supreme

Court of his right to appeal from his conviction. Petitioner's own petition and exhibits disclose that this allegation is untrue. His exhibits show certain letters which effectively refute this charge, among them being one of the trial judge who went to the trouble of giving the petitioner a pointed and timely warning of the steps he would have to take to preserve his right to appeal. These the petitioner failed to heed, failed to appeal this case within the time, and the Supreme Court denied his appeal. As stated by His Honor, James W. Delehant, in his memorandum in this case, that as to the right to appeal, it may be said that its neglect does not impair the jurisdiction of the district court, "It is a very real right, indeed, but one which a defendant may voluntarily waive or abandon or negligently lose."

Point J.

Petition Herein for a Writ of Habeas Coorpus Should be Denied, as none of the Authorities cited by the Petitioner in his Supporting Brief Sustain his Claim for a Writ.

Brown v. *Mississippi*, 297 U. S. 278. The holding in this case is that "use of confession obtained by coercion and brutality as basis for conviction and sentence could not be justified on ground that State had the right to withdraw privilege against self-incrimination."

Bryant v. *Zimmerman*, 278 U. S. 63. This is a case wherein the court held that in a proceeding in habeas corpus in a state court to obtain the release of one held in custody under a criminal charge upon the ground that the state statute on which the charge was based violated the Federal Constitution. The court held that an

order of the state court of last resort refusing the discharge was a final judgment in that suit and subject to review by the Supreme Court of the United States. Nowhere herein does the petitioner show or claim that any statute of Nebraska violates the Federal Constitution.

Gooch v. *United States*, 56 Sup. Ct. Rep. 395, holds that the Federal kidnapping act covers the transportation in interstate or foreign commerce persons who are being unlawfully restrained in order that the captor might secure some benefit to himself, such as a reward, and further holds that the holding of an officer to prevent his arrest of the captor is within the Federal kidnapping law punishing holding for reward or otherwise, and is in no way controlling of the present case.

Johnson v. *Zerbst*, 304 U. S. 458, 58 Sup. Ct. Rep. 1019. In this case, the facts as found by this court were as follows:

> "Petitioner and one Bridwell were arrested in Charleston, S. C., November 21, 1934, charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes. Both were then enlisted men in the United States Marine Corps, on leave. They were bound over to await action of the United States Grand Jury, but were kept in jail due to inability to give bail. January 21, 1935, they were indicted; January 23, 1935, they were taken to Court and there first given notice of the indictment; immediately were arraigned, tried, convicted, and sentenced that day to four and one-half years in the penitentiary; and January 25 were transported to the Federal Penitentiary in Atlanta. While counsel had represented them in the preliminary hearings before the commissioner in which they—some two

months before their trial—were bound over to the Grand Jury, the accused were unable to employ counsel for their trial. Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted, and sentenced, without assistance of counsel.

"Petitioner was convicted without enjoying the assistance of counsel. Believing habeas corpus was not an available remedy, the District Court below made no findings as to waiver by petitioner. In this State of the record we deem it necessary to remand the cause. If—on remand—the District Court finds from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel, it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. If petitioner fails to sustain this burden, he is not entitled to the writ."

In the case at bar, petitioner was represented by counsel throughout the proceedings which resulted in his conviction. The case has no application to the present action.

Ex parte McClusky, 40 Fed. Rep. 71. This is a case wherein the court held that in a criminal proceeding against a party he may waive certain things, but he cannot waive a fundamental right affecting the very jurisdiction of the court to try him. Petitioner herein makes no showing of any fundamental right, waived by him, affecting the very jurisdiction of the courts of Nebraska to try him.

Mooney v. *Holohan,* 294 U. S. 103, 55 Sup. Ct. Rep. 340. The syllabus reads, in part, as follows:

> "Requirement of 'due Process' is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process."

The claim of "perjured or manufactured" testimony by the petitioner herein is negatived by his own showing. The attempted robbery, in the furtherance of which the victim was killed, was perpetrated by two or three men, and one Paul Taylor admitted the crime and at the time of the trial of the petitioner was serving a sentence in the Nebraska State Penitentiary. Hawk was charged with the murder as a principal, under the Nebraska statute, by reason of his alleged participation in the attempted robbery. Petitioner claims that the prosecuting authorities of Douglas County, Nebraska, strove by improper means to get Taylor to testify that the petitioner was a participating accomplice in the proposed robbery. The record, however, shows that if any such attempt was made by the prosecuting officials that such attempt was unsuccessful, and the record further discloses that the witness, Paul Taylor, by his testimony sought wholly to exonerate the petitioner from any participation in the crime whatever. The assertion of perjured and manufactured testimony is, therefore, wholly unsupported by any factual showing.

Moore v. *Dempsey,* 261 U. S. 86, holds that a trial for murder in the state court in which the accused are hurried to conviction under mob domination without regard for their rights, is without due process of law and absolutely void. There is no violation of the rule expressed in this case in the present matter. As stated before, the record discloses that more than a month intervened between the arraignment and the actual trial and nearly two years intervened between the commission of the offense and the trial, and there is not even any allegation by the petitioner that the trial was dominated by mob violence.

Moore v. *Traeger,* 44 Fed. (2d) 312, holds that the Federal court having first taken jurisdiction of a criminal case was entitled, as against the state court subsequently acquiring jurisdiction, to have its sentence first executed.

The facts in this case show that the judgment of the Federal court was first executed before the defendant was required to commence serving his sentence and judgment rendered by the state court.

Powell v. *Alabama,* 287 U. S. 45, holds that the right to counsel in a capital case is guaranteed the person charged by the due process clause of the Fourteenth Amendment to the Constitution of the United States. Petitioner's own petition and pleadings disclose that he was furnished and was represented throughout the trial by counsel, and that there had been no violation of the ruling of the case of *Powell* v. *Alabama.*

In re Robinson, 29 Neb. 135, 45 N. W. 267, holds that where a person is arrested in a sister state and is without extradition forcibly brought into the jurisdiction of

this state and committed to jail to await trial, is entitled to be dscharged on a writ of habeas corpus. This is properly the law of Nebraska, but the opinion in this case has no bearing on the present situation, as the facts as disclosed in the opinion are entirely different from petitioner's situation.

Rogers v. *Alabama,* 192 U. S. 226. We have carefully examined the opinion in this case and cannot find anything therein which in any way has anything to do with the present case.

Smith v. *O'Grady,* 312 U. S. 329. This is a case wherein the court held that a petition for habeas corpus alleging facts showing a case of incarceration for a serious offense resulting from a plea of guilty wherein the petitioner was tricked by the state officers into entering a plea of guilty stated a cause of action under the due process clause of the 14th Amendment. Nowhere herein does petitioner make any such showing and his own pleadings and showings show that he entered no plea of guilty, but pleaded not guilty, had a trial, and was convicted by a jury.

Tinkoff v. *Zerbst,* 80 Fed. (2d) 464. This is a case having to do with the right of habeas corpus where the defendant was wrongfully being deprived of his liberty while an appeal in this case was pending. It has nothing whatever to do with the present case.

We are not unmindful of the decisions in the cases of *Walker* v. *Johnston,* 312 U. S. 275, and *Ex parte Sharp,* 33 Fed. Supp. 464, but it is our contention that the principles involved in those cases have been observed in the present instance and that they should not be extended by the court to cover petitioner's own situation.

CONCLUSION.

We respectfully submit that the petition filed in the District Court of the United States for the District of Nebraska, Lincoln Division, praying for a writ of habeas corpus did not state a cause of action and that the decision to the effect by His Honor James W. Delehant, Judge of that court, affirmed by the Circuit Court of Appeals, Eighth Circuit, should be sustained, for the following reasons:

1. That questions only of state laws were raised;
2. That the decisions of the Supreme Court of Nebraska upon such questions are all adverse to the petitioner;
3. That no remote Federal question is involved;
4. That no constitutional rights of the petitioner had in any way been impaired;
5. That no question of peculiar gravity or of national importance or consequence is involved;
6. That the petitioner has been able to cite not a single authority, Federal, Nebraska, or otherwise that supports his right to a writ of habeas corpus.

We respectfully submit that this case is not a proper one for review by certiorari in this court and that the petition for a writ of certiorari be denied.

Very respectfully,

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